



James, M ORCID logoORCID: <https://orcid.org/0000-0002-6256-611X> and Osborn, G (2013) Guilt By Association: Olympic Law and the IP Effect. Intellectual Property Quarterly, 2. pp. 97-113. ISSN 1364-906X

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Guilty by Association: Olympic Law and the IP Effect¹

INTRODUCTION

In the afterglow of the Olympic and Paralympic Games held in London 2012 it is difficult to recall some of the problems that beset their organisation. In the run up to the Opening Ceremony, the London 2012 Olympic Games was the subject of much criticism.² Broadly speaking this focussed on issues surrounding security,³ ticket allocations,⁴ transport⁵ and spiralling costs in particular, but the intellectual property rights framework was subject to critical examination.⁶ Much of this critique has been vehement, particularly from pressure groups and on social media sites.⁷ On July 16 2012, 12 days before the commencement of the Games, 286 Olympic 'brand police', supplied by the Olympic Delivery Authority and sourced as secondments from 30

¹ The authors would like to thank Chris Ellins who provided extremely useful guidance on a number of points here. The title is an allusion, in part, to H. Carty, 'The common law and the quest for the IP effect' [2007] 3 *Intellectual Property Quarterly* 237. Carty's piece examines how common law provisions might be utilised to supplement the intellectual property regime and '...to extend the protection of commercially valuable intangibles and maximise (claimants') competitive edge', at 238.

² See N. Cohen, "Censorship Olympics", *The Spectator* (2012) 14 July

³ R. Booth and N. Hopkins, "London 2012 Olympics: G4S failures prompt further military deployment" (2012) *The Guardian* 24 July available online at <http://www.guardian.co.uk/uk/2012/jul/24/london-2012-olympics-g4s-military> (Accessed 11 September 2012)

⁴ See generally M. James and G. Osborn, "Consuming the Olympics: the fan, the rights holder and the law, *British Library* On London 2012 tickets see LOGPGA 2006 s31.

⁵ The Daily Telegraph reported a 32 mile queue on the day the Olympic Route Network came into operation, see <http://www.telegraph.co.uk/sport/olympics/news/9402563/London-2012-32-mile-queue-as-first-Games-lane-opens-on-M4.html> (Accessed 11 September 2012). On transport and the Olympics generally see LOGPGA 2006 ss10-18.

⁶ M. James and G. Osborn, "London 2012 and the Impact of the UK's Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?" (2011) 74(3) *M.L.R.* 410, Johnson, "Look out! It's an ambush!" [2008] 2/3 *I.S.L.R.* 24 and H. Padley, 'London 2012: Five years, 9 months and counting' [2006] 28 *E.I.P.R.* 586.

⁷ See in particular the articles archived by Games Monitor at <http://www.gamesmonitor.org.uk/>, (Accessed 25 October 2012) and Space Hijackers at <http://www.protestlondon2012.com/index.php> (Accessed 25 October 2012). See also the special edition of *The Spectator* published on 14 July 2012.

local councils, began investigating ambush marketing of, and illegal associations with, London 2012 that were perceived to be undermining the exclusive marketing position of the official sponsors.⁸

Their extensive powers to police the London 2012 brand were provided by s.33 and Sch.4 London Olympic Games and Paralympic Games Act 2006 (the 2006 Act), which creates a new type of intellectual property right; the London Olympic Association Right (LOAR). Where a breach of the LOAR occurs, a criminal offence is committed and the offending advert could be removed and any item used to create it confiscated. These powers covered not just appropriation and misappropriation of others rights, but also an elastic notion of association that significantly increases the reach of intellectual property protection and provides further evidence of an 'IP effect'.⁹ This article examines the powers created under the 2006 Act and specifically the purview of and need for the LOAR. Explicit within this is the acknowledgment that new forms of intellectual property rights are being created and that these are being driven not by national governments or international treaties, but by a private body, and that these types of extensions to the intellectual property landscape, what we term 'Super IP' (see below) but which has variously been described as quasi IP,¹⁰ uber rights¹¹ and IP plus,¹² ought to be resisted.

⁸ M. Hickman, "Britain flooded with 'brand police' to protect sponsors" *The Independent* 16 July 2012 available at <http://www.independent.co.uk/news/uk/home-news/britain-flooded-with-brand-police-to-protect-sponsors-7945436.html> (Accessed 11 September 2012).

⁹ H Carty, 'The common law and the quest for the IP effect' [2007] 3 *Intellectual Property Quarterly* 237.

¹⁰ H. Padley, 'London 2012: Five years, 9 months and counting' [2006] 28 *E.I.P.R.* 586.

¹¹ V. Horsey, R. Montagnon and J. Smith, "The London Olympics 2012 – restrictions, restrictions, restrictions", (2012) *Journal of Intellectual Property Law and Practice* 715

¹² See Johnson, "Look out! It's an ambush!" [2008] 2/3 *I.S.L.R.* 24

PROTECTING THE OLYMPICS AND THE DEVELOPMENT OF 'SUPER IP'

That the Olympics is a massive commercial entity is well established, with a number of sponsors paying significant sums of money to be associated with the Games.¹³ Given the levels of the commitments, it is unsurprising that sponsors are keen to both maximise the benefit of this association, and protect their investment. It is in the interest of the International Olympic Committee (IOC), as the body that grants these exclusive rights, to help protect these arrangements. As such, four key sponsorship programme protection strategies are used:

- (1) education and public relations initiatives before and during the Games;
- (2) on-site policing;
- (3) contractual terms restricting the behaviour of both spectators and competitors;
and
- (4) the enactment of special intellectual property protection.¹⁴

In terms of the first of these, the pre-emptive strike of a press release campaign has become a common pre-event educative tool. These have a number of purposes. Firstly, to try and ensure that consumers and businesses alike are put on notice of

¹³ See *IOC Marketing: Media Guide. London 2012* (2012) IOC

¹⁴ S. McKelvey and J. Grady, "Sponsorship Program Protection Strategies for Special Sport Events: Are Event Organizers Outmaneuvering ambush marketers?", (2008) *Journal of Sport Management*, 550.

the rights that the right holder has and who the official sponsors actually are. Classic examples of this are where the organisers post their 'Branding Rules' on their official website,¹⁵ placing editorials and articles in trade magazines and the organisation of workshops. Additionally, local businesses and stakeholders may be written to with an outline of the guidelines that must be adhered to. Further, specific phrases and techniques that *can* be used may be detailed. This can be seen as a soft approach, which actually perhaps stretches the truth in parts, but seeks to educate rather than threaten.¹⁶

In terms of on-site policing, as noted above London 2012 saw 286 brand police working in the venues to patrol and enforce the regulations. This strategy is a dangerous one as its rigid enforcement can backfire on the official sponsors; witness the spectator who was removed from a Cricket World Cup match in 2003 after he refused to surrender his cans Coca Cola to security staff. Pepsi was an official sponsor of CWC 2003, and this heavy handed brand policing arguably reflected badly on the official sponsors, as did the much publicised Bavaria beer incident at the FIFA World Cup 2006.¹⁷ The policing may extend to the creation of Ambush Marketing Protocols such as the above, the compliance with 'clean zone' requirements, covering of non-sponsor logos in venues and other areas of stadia and even athlete villages.

¹⁵ See for example here the London 2012 website <http://www.london2012.com> (Accessed 25 October 2012).

¹⁶ S. McKelvey and J. Grady, "Sponsorship Program Protection Strategies for Special Sport Events: Are Event Organizers Outmaneuvering ambush marketers?", (2008) *Journal of Sport Management*, 562.

¹⁷ L. Harding and A. Culf, "The new World Cup rule: take off your trousers, they're offending our sponsor", (2006) *The Guardian* 19 June available online at <http://www.guardian.co.uk/media/2006/jun/19/marketingandpr.worldcup2006> last accessed 21/09/12.

The contractual control over spectators and athletes is similarly far-reaching. At London 2012 for example, spectators were subject to an impressively long list of terms and conditions incorporated into the contract.¹⁸ In terms of the impact upon sponsors, clause 19.2.3 provided that there were a number of restricted and prohibited items. Athletes too were subject to this policing. Rule 40 of the Olympic Charter limits the ability of athletes competing in an Olympic Games to appear in advertising before, during and after an edition of the Games. Specific Guidelines were issued to athletes by the London Organising Committee of the Olympic Games (LOCOG)¹⁹ in 2011 detailing the athletes' restrictions,²⁰ and during the Games there was a well publicised potential breach of these when images of Michael Phelps forming part of the Vuitton 'Core Values' campaign were released via Twitter, ostensibly in breach of Rule 40.²¹

For our purposes it is the fourth element, the creation of specific intellectual property protections that is most important. This aspect is enshrined in the Host City Bid process and is broadly speaking the intellectual property response to ambush marketing. Ambush marketing, and its limits, is defined below, but in brief, ambush marketing can be broadly split into two forms. First, as an attempt to associate with

¹⁸ See the Terms and Conditions available via <http://www.tickets.london2012.com/purchaseterms.html> (Accessed 11 September 2012). Arguably the contractual form would be a more suitable vehicle to protect Olympic iconography than the legislative approach which, as we argue throughout, is problematic.

¹⁹ For example the IOC's Official Partners are: Coca Cola (non-alcoholic beverages), ACER (computing equipment), Atos (information technology), DOW (chemistry company), GE (energy generation systems, energy distribution systems, healthcare: diagnostic imaging, monitoring and electronic medical records technology, lighting fixtures & systems, aircraft engines, rail transportation, water treatment facilities & services, equipment & transportation management), McDonald's (retain food services), Omega (time pieces, timing systems and scoring systems), Panasonic (audio, TV and video equipment), Proctor and Gamble (personal care and household products), Samsung (wireless communication equipment) and Visa (consumer payment systems).

²⁰ LOCOG, Rule 40. "What athletes and agents need to know" (2011)

²¹ See for example here P. Mitra "Michael Phelps lands into trouble over Louis Vuitton Ad" available at <http://www.allvoices.com/contributed-news/12809383-michael-phelps-lands-into-trouble-over-louis-vuitton-ad> (Accessed 25 October 2012)

an event, without paying for it. Secondly, a narrower idea of ambush marketing where a company intentionally seeks to create a perception of a link where none exists. Grady, McKelvey and Bernthal²² describe this latter process as a more combative strategy, and indeed whilst the former might be seen as a 'parallel' practice, the latter is seen as a 'parasitic' one.²³ Ambush marketing can also be stratified into ambush marketing of an event, or of a sponsor, and is a nuanced term. The essence of ambush marketing is, however, predicated upon unpaid and unauthorised association; it is not just about undermining legitimate sponsors but also about creating an association when in actuality none exists.

In terms of London 2012, ambush marketing is dealt with primarily under the 2006 Act, and its accompanying Regulations.²⁴ Commentaries on this 'Olympic law'²⁵ have been largely descriptive, explaining how not to fall foul of its provisions,²⁶ rather than engaging critically with the need for, and scope of, a new criminal offence of unauthorised association with the London Olympic Games. Indeed, some commentators even go so far as to say that such critiques are unnecessary 'grumbling' as the legislation is an essential requirement of the Host City Contract rather than a decision that lies within the discretion of Parliament to determine the

²² John Grady, Steve McKelvey and Matthew Bernthal 'From Beijing 2008 to London 2012: Examining event-specific Olympic legislation vis-à-vis the rights and interests of stakeholders' *Journal of Sponsorship* 144 2010.

²³ S. McKelvey and J. Grady, "Sponsorship Program Protection Strategies for Special Sport Events: Are Event Organizers Outmaneuvering ambush marketers?", (2008) *Journal of Sport Management*, 550, 554.

²⁴ The London Olympic Games and Paralympic Games Regulations 2011 (the 2011 Regulations).

²⁵ The term, and indeed the more florid 'lex olympica', may be contentious, although it has been used by writers such as Maestre - A. Maestre, *Law and the Olympics*, 2010, Cambridge. See more broadly the debates around the provenance of *lex sportiva*.

²⁶ See for example the series of articles collected together in 'Focus on the Olympics' [2012] 6 *Intellectual Property Magazine* 23-32, Miller, ISLR.

need for such protections.²⁷ However, these contentious developments are worthy of full and proper consideration. In particular, the genesis and creation of these ‘super IP’ laws for the benefit of the Organising Committees of the Olympic Games and the IOC is in need of serious analysis, and is the focus of this article.

The term ‘super IP’ is used here to denote an intellectual property regime that goes beyond the parameters of traditional IP law and, in these circumstances, extends the protection available to the very specific circumstances associated with hosting the Olympic Games.²⁸ The idea of extending traditional categories of protection to embrace novel situations is not itself new; for example, within media law, the extension of injunctions to cover acknowledging even the *existence* of such an injunction illustrates an attempt to move the parameters and boundaries of traditional legal forms beyond their original purview.²⁹ These orders ‘...have from time to time been made prohibiting the disclosure of the fact that an order has been made and providing for sealing the whole court file. Some newspapers refer to these as “super injunctions”’.³⁰

The use of ‘super’ here stresses that this type of injunction is a strengthened version, the conditions of which go significantly beyond the norm. In our view, ‘super’ when used in respect of intellectual property has a similar meaning as we are seeing the emergence of new forms of intellectual property protection that reach far beyond the

²⁷ Annette Freeman, ‘Olympic brand protection: draconian or justified?’ [2012] 6 *Intellectual Property Magazine* 24.

²⁸ As noted above, other terms for this include uber rights, IP plus and quasi IP.

²⁹ See for example C Gallery ‘John Terry: reflections on public image, sponsorship, and employment’, *International Sports Law Review* 2010 48, U Smartt ‘Safety first: the Ryan Giggs superinjunction Part 2 of March 2012’ *Comms L* 2012 17(2) 50, Robert Pearce ‘Privacy, superinjunctions and anonymity: “selling my story will sort my life out”’ *Denning LJ* 2011 92

³⁰ John Terry (previously referred to as LNS) v Persons Unknown [2010] EWHC 119 (QB) paragraph 24.

usual parameters of intellectual property law. Crucially in the case under examination here, these developments are being driven by a private body; the IOC. This is in contradistinction to the law's normal mode of development through the actions of national governments and sovereign states, as these super-strength laws are emerging because of the pressure placed upon these nation states by powerful, private, transnational bodies. The extent and provenance of these new forms of protection, and the directions in which they are developing, has been subject to sharp criticism that has in particular focussed on issues such as censorship and freedom of speech. This article analyses these developments and examines the intellectual property protection available to the Olympic Movement and Olympic Games generally. It then discusses the specific regulatory regime surrounding London 2012 and how the legislation has been created to deal with a specific problem, apparently not easily captured by the existing legislation; unauthorised association with the Games by ambush marketing. It concludes by analysing the effects of the development of these 'super IP' rights and the ramifications for national governments acceding to the demands of a private body, particularly in terms of freedom of speech.

CAN TRADITIONAL IP LAW PROTECT THE OLYMPICS?

An edition of the Olympic Games gives rise to an extraordinary number of artistic creations that the authorities deem require the protection of the law.³¹ At London

³¹ See for example, LOCOG's guidance, available at: http://www.london2012.com/mm/Document/Publications/StrategiesPolicy/01/24/71/64/statutory-marketing-rights_English.pdf, (Accessed 19 August 2012).

2012 these ranged from the obvious, such as the fourteen registered Games Marks including the purple and yellow logos and associated font that were ubiquitous during 2012, to the less so, including the medals, posters, mascots and pictograms that represented each of the Olympic sporting disciplines. Each of these creations receives the usual protection under copyright law, or as registered designs or trademarks, whichever is the more appropriate.

The problem faced by the IOC, and the domestic organisers of the Games, in this case the London Organising Committee of the Olympic Games (LOCOG), is that these traditional protections do not appear to prevent organisations that are not a part of the official sponsorship programme from gaining a commercial advantage by in some way associating themselves with the goodwill invested in the Olympics. For example, copyright only applies to logos and designs not to words. Thus the words and phrases most commonly associated with London 2012, including 'London 2012' itself, cannot be copyrighted.³² Further, trademarks can be registered in respect of various logos in order to designate official items, but words and phrases cannot where these are in pre-existing common usage, such as 'Summer', 'Games' and 'Gold'. Trade mark law is still relatively narrowly framed, however, and where there is no direct use of a protected mark or something so similar that it creates confusion in the mind of the consumer, there is no breach.³³ Finally, in all but the most unsophisticated cases, an action in passing off will not be sustainable unless it can be proven that an unauthorised commercial association with Games was made by means of a deliberate misrepresentation that the advertiser was an official sponsor.

³² This is of course due to the fact that usually these would not qualify as literary works under the copyright Designs and Patents Act 1988 s3(1) on policy grounds. See however critiques such as J. Cullabine, "Copyright in short phrases and single words" (1992) E.I.P.R 205.

³³ Arsenal Football Club Plc v Reed (No.2) [2003] EWCA Civ 1668.

Thus, without specific legislative protection for these more ethereal commercial rights of association, where no direct reference is made to the Games and none of the protected marks are used, there is no breach of existing intellectual property law.

Whilst these traditional forms of IP protection are available, and could have been fully utilised by the Organising Committee in order to maximise the commercial value of its sponsorship and merchandising rights, these protections are perceived as being insufficient, by both LOCOG and the IOC and, importantly, the sponsors. The difficulty faced by a body such as LOCOG, and what the IOC is most keen to see more closely regulated by statute, are the activities of ambush marketers and the impact that their campaigns could have on the value of the official sponsors' exclusive relationship with the Games. If a commercial rival can achieve similar levels of exposure and/or appear to be associated officially with the Olympics when they are not, then no company would pay such large amounts to sponsor a mega-event such as London 2012.

'Association' is, therefore, the conceptual key to the requirement of event specific legislation by these bodies. They are not overly concerned with direct or overt infringements as these rarely occur, although countless threats were made to small businesses during the Torch Relay for infringing both the OAR and LOAR when trying to create a carnival atmosphere along its route.³⁴ Instead, their concern is that organisations are seeking to extract commercial advantage through any kind of association with the Games, which LOCOG and the IOC see as unwarranted freeloading. It is this element of UK Olympic law, the extension of IP law to prevent

³⁴ For a good round up of stories, see <http://www.bbc.co.uk/news/magazine-18182541>, last accessed 19/08/12.

any unauthorised association with the Games rather than a direct infringement of existing intellectual property rights, that is the cause for concern, particularly as the regulatory framework in place for London 2012 is already being used as a template for future mega events.³⁵

Interestingly, European trade mark law has attempted in the past to graft a notion of 'association' onto trademarks and is referred to as the Benelux view of infringement.³⁶ This provides that a trade mark can be infringed even if the consumer was not misled as to origin if an *association* was created in the minds of consumers and that a mark could be rejected where there was only a conceptual association with the original.³⁷ This was neatly termed 'non-origin association' by Laddie J in *Wagamama v City Centre Restaurants*.³⁸ This approach was rejected in the case of *Sabel v Puma*,³⁹ which has since been used as the starting point for guidance on whether marks will be deemed similar using the 'global appreciation' approach.⁴⁰ Interestingly, in 1996 in the case *New Zealand and Commonwealth Games Assn v Telecom New Zealand and Saatchi and Saatchi*⁴¹ a visual pun was made on the Olympic Rings using coloured telephones. An application for an interim injunction failed on the basis that although the public might be mildly amused by the pun, no business association would be presumed by them. Importantly, this was before any

³⁵ For further detail about the legal frameworks for the next two Olympic Games see M Prokopets and D Zhubrin, 'Legal regulation of organisation and holding of the Olympic Games in the Russian Federation' [2012] 1/2 *International Sports Law Journal*, 37 and E Harris, 'Rings of controversy: an analysis of the 2016 Rio Olympic Games logo controversy' [2012] 1/2 *International Sports Law Journal* 80-83 and 86-89.

³⁶ See Jacob, 2 also P Prescott 'Has the Benelux Trade Mark Law been written into the Directive?' [1997] EIPR 99 P Haris 'UK trade mark law: are you confused' [1995] EIPR 601.

³⁷ See C Gielen 'Harmonization of trade mark law in Europe: The first trade mark harmonization directive', [1992] EIPR 262; C Gielen 'Likelihood of association: What does it mean? 1996 *Trademark World* 20 See here *Claeryn v Klarei*, Case A 74/1, Jur1975, 472 (Netherland).

³⁸ [1995] FSR 713.

³⁹ [1998] 1 C.M.L.R. 445

⁴⁰ See Bently and Sherman 863

⁴¹ 2/5/96, HC Wellington, CP 95/96.

specific legislation was in place in New Zealand protecting the Olympic symbol and it is unlikely the same result would have been reached under the UK's Olympic legislation.⁴² Thus, broader issues of association have been subject to intellectual property protection, but the Olympics are different in that rather than attempting to graft association onto existing intellectual property concepts, the IOC benefits from specific legislation dealing with the problem of association, and indeed, from specific legislation protecting its iconography.

THE PROTECTION OF OLYMPIC ICONOGRAPHY

The latest version of the Olympic Charter (OC), published in 2010, defines the commercial rights associated with the Olympic Movement and groups them together as the Olympic Properties in Rules 7-14 OC.⁴³ Rule 7 OC explicitly defines the Olympic Properties and the rights that the IOC exerts over them in very specific terms:

7 Rights over the Olympic Games and Olympic properties

1. The Olympic Games are the exclusive property of the IOC which owns all rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanism whatsoever, whether now existing or developed in

⁴² See for example LOCOG's reaction to the depiction of the Olympic rings using sausages at: <http://news.bbc.co.uk/1/hi/england/dorset/6972224.stm>, last accessed 19/08/12.

⁴³ IOC, *Olympic Charter*, (2011). Available at: <http://www.olympic.org/olympic-charter/documents-reports-studies-publications>, last accessed, 18/09/2012. See also M. James and G. Osborn, "The Sources and Interpretation of Olympic Law", (2012) Legal Information Management, 80.

the future. The IOC shall determine the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games.

2. The Olympic symbol, flag, motto, anthem, identifications (including but not limited to “Olympic Games” and “Games of the Olympiad”), designations, emblems, flame and torches, as defined in Rules 8-14 below, shall be collectively or individually referred to as “Olympic properties”. All rights to any and all Olympic properties, as well as all rights to the use thereof, belong exclusively to the IOC, including but not limited to the use for any profit-making, commercial or advertising purposes. The IOC may license all or part of its rights on terms and conditions set forth by the IOC Executive Board.

As can be seen, this is a broad list of Olympic properties, far beyond just the Olympic rings that are so associated with the Games and Movement. Rules 8-14 OC provide more detailed definitions of the Olympic Properties including in particular the symbol, motto and torch, of which only the ‘designations’ are not self-evident. These marks include any official emblem that incorporates the Olympic Symbol as a constituent element and in particular those used by the National Olympic Committees, in the UK the British Olympic Association (BOA), and the various logos produced for each edition of the Games. The bye-laws⁴⁴ to Rules 7-17 OC explain how the IOC will take steps to protect the Olympic Properties in both national and international law, and provide the framework for approval of their use. In short, nobody can use the Olympic Properties without the permission of the IOC, even where these properties

⁴⁴ These are contained in the Charter see pp22-28

are protected for the benefit of the National Olympic Committee, as is the case in the UK. This control over the use of the Olympic Symbol in particular has seen the five interlocking rings become one of the most instantly recognisable and valuable logos in the world.⁴⁵

There are two means by which the Olympic Properties and the words and phrases most closely associated with the Olympic Movement are protected; at the international level, by ratification of the Nairobi Treaty on the Protection of the Olympic Symbol, or at the national level by the creation of a specific Act of Parliament. Specific protection for each edition of the Olympic Games is discussed separately below.

International protection for the Olympic Symbols – the Nairobi Treaty

Despite the provisions in the 2010 version of the OC, it was not originally intended for the Olympic Symbol, or any of the Properties, to be commercial rights needing trade mark protection. As a result, the Olympic Symbol initially received little or no protection from an intellectual property perspective. Rather it was intended to be an international emblem or symbol of Olympism, and not created as a form of intellectual property owned and controlled absolutely by the IOC and vigorously exploited by it as a key revenue stream. Indeed, it appears de Coubertin first unveiled the Olympic symbol in 1914 at an event to celebrate the 20th anniversary of the modern Games and his vision was for it to denote the definitive seal on the Olympic revival. The interlocking rings, rather than representing the five continents,

⁴⁵ Whilst rare to give symbols specific statutory protection, there are of course other examples such as the Red Cross symbol, see Geneva Conventions Act 1957 s6.

were representative of the colours on the flags of countries that had appeared in the first five modern Olympiads and their interlocking nature symbolised the linking of sporting bodies and had featured as an emblem of a body with which he had been previously involved, the USFA.⁴⁶

Since then, the IOC has become acutely aware of the commercial value of its properties, particularly following the first truly commercial games at Los Angeles 1984. In order to address the need for regulating the use of the rings and related words, the Nairobi Treaty on the Protection of the Olympic Symbol was developed under the auspices of the World Intellectual Property Organisation in 1981. The aim of the Nairobi Treaty is to protect the key Olympic Symbols by prohibiting by appropriate measures the registration as a mark and the use, as a mark or other sign, for commercial purposes, any sign consisting of or containing the Olympic symbol, except with the authorization of the International Olympic Committee.⁴⁷ The extent of this Treaty, once brought into force, is formidable and Jacob notes the breadth of the protection granted and its unusual status:

Unlike a trade mark, it does not matter what the trade may be. It can be in any goods or any services. The width of the protection is also wider than that for a trade mark. It extends to a “representation of something similar to the Symbol or motto as to create in the public mind an association with it”. *That is remarkable - maybe Benelux-type association is enough* (our emphasis).⁴⁸

⁴⁶ See R. Barney, “This Great Symbol”, (1992) *Olympic Review*, 627.

⁴⁷ Art.1 Nairobi Treaty.

⁴⁸ Mr Justice Jacob ‘Trade marks and the Olympic Games throughout the years’ [2001] EIPR 1, 2.

Under the Nairobi Treaty, the Olympic symbol receives much wider protection than would a normal trade mark. It is not category specific, it does not a designation of origin and the protection granted to the IOC is absolute. Perhaps because of these issues, the Treaty is not accepted universally as the appropriate means of protecting the Olympic Properties. To date, there are 68 signatories, compared to 204 national members of the IOC, of which 50 have ratified the Treaty. In many other countries, such as the UK national legislation provides the necessary protection but for the benefit of the National Olympic Committee rather than the IOC.

UK protection – the Olympic Association Right

The ways in which the Olympic Properties are protected at national level vary from state to state. For example, in the USA and Australia, similar protections to those in place in the UK are found in the Ted Stevens Olympic and Amateur Sports Act 1978 and the Olympic Insignia Protection Act 1987 respectively.⁴⁹ In the UK, the Olympic Symbol etc. (Protection) Act 1995 (the 1995 Act) introduced the concept of an 'association right' by creating the Olympic Association Right (OAR) for the benefit of the proprietor, the BOA.⁵⁰ Under s.2 of the 1995 Act,⁵¹ the OAR confers exclusive rights to use the Olympic Symbol, the Olympic motto⁵² and the protected words on the proprietor from 20 September 1995. The protected words are defined in

⁴⁹ For a brief overview of the US federal legislation see:

<http://www.citmedialaw.org/blog/2012/olympic-citius-altius-fortius-pan-american-us-olympic-committees-exclusive-rights>, last accessed 19/08/2012.

⁵⁰ For the period 30 March 2006 to 31 December 2012, LOCOG was a joint beneficiary of the OAR.

⁵¹ Sections 5A and 18(2)(b) of the 1995 Act creates the Paralympic Association Right, which mirrors the OAR by protecting the Paralympic equivalents of the Olympic symbols and words.

⁵² 'Citius, altius, fortius' and its translation, 'Faster, higher, stronger'. The Paralympic motto is, 'Spirit in Motion'.

s.18(2)(a)-(b) as being Olympiad, Olympian and Olympic, their plurals and Paralympic equivalents.

The OAR is infringed where a representation of the Olympic Symbol, motto or a protected word (a controlled representation) is made without the proprietor's prior authorisation and in the course of trade. Further, s.32 and Sch.3 of the 2006 Act extended the ambit of the OAR so that is also breached where there is unauthorised use of a representation of something so similar to the Olympic symbol or the Olympic motto as to be likely to create in the public mind an association with it, or a word so similar to a protected word as to be likely to create in the public mind an association with the Olympic Games or the Olympic Movement.⁵³ In this context, association means in particular, but is not limited to, a commercial, contractual, corporate or financial link with the Games. No such link is created where a controlled representation is made in accordance with 'honest practices in industrial or commercial matters.'⁵⁴

The 1995 Act provides the proprietor with two specific causes of action. Under s.6, the proprietor can seek, by means of a civil action, damages, injunctions and account of profits, and erasure or removal of controlled representations (for example, of offending signs or hoardings) and delivery up and/or disposal of infringing goods, materials and articles under Regs. 2-4 Olympics, Paralympics and London Olympics Association Rights (Infringement Proceedings) Regulations 2010. Further, s.8 of the 1995 Act creates three new and related *criminal* offences in respect of the

⁵³ Section 3(1) of the 1995 Act. There are a number of defences and limits placed upon this via OSPA 1995 s4.

⁵⁴ Section 4(3)(b) of the 1995 Act.

unauthorised use of controlled representations where the user intends to make a gain for himself or another or with a view to causing a loss to another person. First, it is an offence for a person to apply a controlled representation, as defined above, to their packaging and to sell, hire, offer for sale or distribute goods bearing a controlled representation. Secondly, if a person applies to, or uses on, material intended to be used as labelling or packaging, business paper or for advertising goods, a controlled representation, they commit an offence. Thirdly, it is a crime to make an article specifically designed or adapted for making copies of a controlled representation. In each case, it is also an offence for a person to have in their possession anything that enables them to commit any of the above offences, including materials bearing the controlled representations and the means of copying such controlled representations. Anyone found guilty of one of these offences can be fined up to a maximum of £20,000 per breach.⁵⁵

Although described as an association right, the OAR is probably best regarded as a quasi-trade mark.⁵⁶ It combines the protection afforded to a trade mark in s.3(1)(a) of the 1995 Act, by banning outright the direct unauthorised use of controlled representations, with passing off in s.3(1)(b) where the use of the controlled representations and/or protected words in a manner that is likely to create in the public mind an association with the Olympic Games and/or the Olympic Movement also constitutes an infringement. Further, it circumvents the problem of a proprietor being unable to protect words that are in common usage by providing them with specific statutory protection.

⁵⁵ Para.11 of Sch.3 of the 2006 Act.

⁵⁶ See further H. Padley, 'London 2012: Five years, 9 months and counting' [2006] 28 E.I.P.R 586.

The OAR is narrowly defined to protect only the words and symbols most closely connected to the Olympic Games and to prevent their unauthorised commercial exploitation. It was introduced to provide what is accepted as being a genuine benefit to British sport; it enables the BOA to be financially and politically independent, reliant on neither the government nor the sporting authorities for its funding. Thus, outside of the London 2012 period where LOCOG is a co-proprietor, it provides the Olympic Properties with specific protection for a specific purpose. The criticisms that have been aimed at the OAR have not been about its content, breadth or purpose, but have focused on its enforcement. During the Olympic Torch Relay, there were many examples that clearly demonstrated that LOCOG was taking a zero tolerance approach to all actual and perceived infringements of the OAR. Throughout any discussion of the enforcement of the OAR, it must be remembered that LOCOG's interpretation of the law is not necessarily the one that would be used by the courts if litigation was ever to occur. If the OAR is treated as providing quasi-trade mark protection, then it is likely that any unauthorised use of the Olympic Symbol, whether made using sausages, knitted or composed of flowers would be prohibited as it is a controlled representation.⁵⁷ In the light of the reasoning in *Arsenal v Reed*,⁵⁸ even a claim that by displaying the interlocking five-ringed symbol a person was only demonstrating their support for the Torch Relay and its participants, or simply just declaring one's support as did the University of Derby,⁵⁹ or was simply joining in the carnival atmosphere of the Games like newsagent Hamdy Shahein,⁶⁰ is likely to fail. Thus, the OAR provides statutory protection for the words and symbols most closely

⁵⁷ <http://www.bbc.co.uk/news/magazine-18182541>, last accessed 16/08/12.

⁵⁸ *Arsenal Football Club Plc v Reed (No.2)* [2003] EWCA Civ 1668.

⁵⁹ <http://www.bbc.co.uk/news/uk-england-derbyshire-17833838>, last accessed 19/08/12.

⁶⁰ <http://hackneycitizen.co.uk/2012/07/24/hackney-newsagents-bunting-olympic-brand-policing/>, last accessed 16/08/12.

associated with the Olympic and Paralympic Movements above and beyond that which is available for the commercial rights of other commercial organisations.

EDITION SPECIFIC OLYMPIC LAW: IP AND LONDON 2012

The problem faced by the organisers of each edition of the modern Olympics, in this case LOCOG,⁶¹ is that in order to raise the funds necessary to present the level of spectacle expected it is essential that it exploits and protects its various commercial, intellectual property and merchandising rights with unprecedented vigour. One of LOCOG's key income streams is the money brought in through its official sponsorship programme, which is estimated to have provided around £800m to the overall cost of hosting London 2012. In order to maximise the earnings from these sponsors, exclusive rights to be associated with the Games are granted to companies in distinct, sector specific categories.⁶² Once these exclusive rights have been granted, some companies that have missed out on official sponsor status, or which simply did not want to pay the required fee, seek to associate themselves with the Games unofficially and will attempt to exploit the goodwill in the Olympics and promote their own brands alongside of that interest; this is the beginnings of an

⁶¹ LOCOG was the acronym of the London Organising Committee of the Olympic Games, and was the private limited company created to organise the London 2012 Games. Consider here also the role of the Olympic Delivery authority (ODA) which was the body tasked with delivering the infrastructure for London 2012, and which was created under LOGPGA 2012, s3. The ODA was also tasked with the enforcement of infringements of the criminal elements of the LOGPGA 2012.

⁶² For example the IOC's Official Partners are: Coca Cola (non-alcoholic beverages), ACER (computing equipment), Atos (information technology), DOW (chemistry company), GE (energy generation systems, energy distribution systems, healthcare: diagnostic imaging, monitoring and electronic medical records technology, lighting fixtures & systems, aircraft engines, rail transportation, water treatment facilities & services, equipment & transportation management), McDonald's (retain food services), Omega (time pieces, timing systems and scoring systems), Panasonic (audio, TV and video equipment), Proctor and Gamble (personal care and household products), Samsung (wireless communication equipment) and Visa (consumer payment systems).

ambush marketing campaign.⁶³ So outside of the general Olympic protection, there is also Edition specific (each Games are called an Edition) protection that is enacted. For example, whilst Beijing had specific legislation detailing six different commercial categories of Olympic property to be protected, through the Protection of Olympic Symbol Regulations 2002 (China) Art 2, the following winter Games, Canada 2010, did not originally have specific protection. Instead, Olympic marks would be protected impliedly by its generic Trade Marks Act, Unfair Competition and Prohibited Marks 2001 (Canada) until it was decided that more specific protections were required, as were contained in the Olympic and Paralympic Marks Act 2007. So each individual nation state, or host country will adopt provisions to protect the specificities of its own Edition of the Games.

In the UK, Parliament sought to protect the London 2012 brand by creating a complex framework of protections based not only on traditional categories of IP rights but also by introducing a novel and far-reaching 'super IP' right, the London Olympic Association Right (LOAR). The LOAR creates a new kind of quasi-IP protection that goes significantly further than the quasi-trade mark protection provided by the OAR by criminalising the 'misappropriation'⁶⁴ of the goodwill vested in and interest surrounding the Olympic Games. Providing protection through the concept of an association right is a legislative technique that is rapidly becoming the norm at sporting mega-events. Interestingly, whilst the idea of creating event specific legislation now appears entrenched, a study post Vancouver 2010 found little or no

⁶³ For a more detailed definition and discussion of this concept, see below.

⁶⁴ See further, H Carty, 'The common law and the quest for the IP effect' [2007] 3 *Intellectual Property Quarterly* 237.

rationale for such legislation, and that in fact such legislation may have a negative effect when citizens' rights are taken into account.⁶⁵

The problem of 'association'

The difficulty faced by a commercial rights holder is that none of these traditional protections is particularly successful at protecting official sponsors from the more sophisticated examples of ambush marketing. These include approaches or campaigns that only hint at associations with the event, or simply try to dilute the power of the official campaigns. Thus, there exists a lacuna in the current law, or at least one is perceived to exist by the organisers of sporting mega-events, that enables unauthorised and unofficial association with the event that provides a commercial advantage to the ambusher. Ambush marketing is a contested term that eludes easy definition.⁶⁶ It is generally understood to occur where an advertiser makes a deliberate and unauthorised association with an event with a view to exploiting the goodwill or wider public interest in it for commercial purposes.⁶⁷ This can be broken down further into two specific ambush marketing techniques. Ambush marketing *by association*, or ambushing the event, is where marketers attempt to draw attention to their own brand by creating the impression that they are amongst the official sponsors of the event. The best example of this is provided by events at Atlanta 1996 where Nike instigated a campaign including a swathe of massive billboards, the distribution of 'swoosh' banners to spectators and the erection of a

⁶⁵ B. Seguin D Ellis D.Scassa M. Parent, "Who's ambushing whom? An examination of anti-ambush marketing legislation in Canada: The case of the 2010 Olympic and Paralympic Winter Games", (2008) EASM Conference Paper.

⁶⁶ See for example Grady et al above

⁶⁷ See further, J Hoek and P Glendall, 'Ambush Marketing: More than just a commercial irritant' [2000] 1(2) *Entertainment Law* 72, C Michalos, 'Five golden rings: development of the protection of the Olympic insignia' [2006] 3 *International Sports Law Review* 64 and D Cran and S Griffiths, 'Ambush Marketing: unsporting behaviour or fair play' (2010) 21(8) *Entertainment Law Review* 293.

'Nike Centre' close to the Olympic stadium. This campaign was massively successful with many people believing Nike had been an official sponsor and this led to more aggressive forms of protection being sought by the IOC and sponsors.⁶⁸ At London 2012 the bookmaker Paddy Power instigated a similarly constructed campaign,⁶⁹ as outlined below.

Alternatively, there is ambush marketing *by intrusion*, or ambushing the official sponsor, where the marketer directs the ambush at an official sponsor or partner of the event with a view to drawing attention to its own brand, undermining the value of official brand, and/or parodying the official campaign. Perhaps the best example of this is the American Express ambushing of VISA at Lillehammer, Norway at the 1994 Winter Games with the campaign culminating with the advice, 'So if you're traveling to Norway, you'll need a passport but you don't need a Visa'.⁷⁰ At London 2012 further sophisticated and amusing examples were provided, again, by Nike and also by wine seller Oddbins.⁷¹

All aspects of ambush marketing centre on creating an association of some kind with the event and are generally seen by event organisers, like LOCOG, and rights owners, like the IOC, as being combative measures that devalue the official

⁶⁸ See for example M. Payne *Olympic Turnaround: How the Olympic Games Stepped Back from the Brink of Extinction to Become the World's Best Known Brand - and a Multi Billion Dollar Global Franchise*, 2005.

⁶⁹ <http://www.creativereview.co.uk/cr-blog/2012/july/ambush-advertising-olympics> last accessed 18/09/1966.

⁷⁰ See for example "Credit Card War Erupts at Olympics : Advertising: IOC accuses American Express Co. of 'ambush marketing' in campaign aimed at rival Visa" (1994) LA Times 19 February available at http://articles.latimes.com/1994-02-19/business/fi-24757_1_american-express, last accessed 18/09/1966.

⁷¹ See <http://www.creativereview.co.uk/cr-blog/2012/july/ambush-advertising-olympics>, last accessed 08/11/2012.

sponsor's exclusive marketing arrangements.⁷² Modern ambush marketing campaigns are designed specifically not to interfere with the traditional IP rights of the event organiser wherever possible. Their object is not to infringe their rivals' commercial rights; it is much more subtle than that. It is instead either an attempt to create in the mind of the public the perception of official sponsor status, or the undermining of the official sponsorship programme, or is simply a means of exploiting the interest in a global mega event for their own commercial benefit without recourse or reference to any of the protected properties.

Further, actions to protect IP rights by traditional legal actions take too long from the perspective of the rights holder or official sponsor who will want to take immediate action by means of an injunction to stop and/or remove the offending campaign. It is from this basis that the IOC perceives the need for some sort of expediting of the law to ensure that any ambush that does take place can be curtailed as quickly and efficiently as possible.

Thus, ambush marketing is much more like 'misappropriation' than the kind of deliberate interference with or misrepresentation about commercial rights that is normally protected. Carty states that without the development of the common law to prevent misappropriation, it will only be capable of being prevented by the introduction of activity or organisation specific legislation.⁷³ This is exactly what the IOC has been able to demand from prospective host cities and the municipal,

⁷² See here John Grady, Steve McKelvey and Matthew Bernthal 'From Beijing 2008 to London 2012: Examining event-specific Olympic legislation vis-à-vis the rights and interests of stakeholders' *Journal of Sponsorship* (2010) 144.

⁷³ H Carty, 'The common law and the quest for the IP effect' [2007] 3 *Intellectual Property Quarterly* 237.

regional and national governments in which the Olympic Games take place.⁷⁴

However, just because such protections are demanded does not mean that it is either necessary or appropriate to grant them:

Yet there is uncertainty surrounding the question of laws to prevent ambush marketing. The extensive legal protections that are now sought by those opposed to ambush marketing have, for reasons of fundamental principle, not been considered appropriate in traditional laws. Arguably, ambush marketing legislation raises other ethical and political questions including the question of when it is ethically acceptable for the state to provide favourable legislative regimes for selected businesses. Existing consumer laws, intellectual property laws, which have traditionally been used to address marketing issues, have always maintained a balance between individual freedoms, the public interest and state coercion. Legislation that will specifically address ambush marketing may affect that balance and, therefore, needs to be introduced with caution.⁷⁵

What appears to be happening here is that the power of organisations such as the IOC to grant or withhold the right to host the Olympic Games, unilaterally and without appeal, enables them to demand that the coercive power of the state be used to enforce its own private rules and protect its commercial rights. This in turn is disturbing the balance between individual freedoms, the public interest and state coercion without any coherent rationale for doing so.

⁷⁴ Ibid, at p.265.

⁷⁵ Susan Corbett and Yvonne van Roy, 'Events management in New Zealand: one law to rule them all?' [2010] 4 *Journal of Business Law* 338, at p339.

The London Olympic Association Right

In order to provide the additional protection from ambush marketing thought to be necessary by the IOC, specific legislation had to be enacted to protect the right to associate with London 2012. By agreeing to implement s.33 and sch.4 of the 2006 Act, the UK government has actualised the prediction made by Carty that without a developed law of misappropriation, whether or not this is an appropriate way for the law to develop, powerful private lobbyists would begin to demand specific legislative protection for their commercial rights. The LOAR takes the concept of the 'association right' considerably further, and into uncharted territory as far as UK law is concerned, and creates a new category of 'super IP' that draws on elements of the traditional protections but closes off the loopholes in the current framework as seen from the perspective of the rights holders.

The definition of the LOAR is considerably wider than that of the OAR. It is not limited to the use of the words and symbols most directly or commonly associated with London 2012, as the OAR is to the corresponding Olympic representations, but prohibits the use of, '*any representation of (of any kind)* in a manner that is likely to *suggest* to the public that there is an association between the London Olympics'⁷⁶ and any goods or services or any person who provides such goods and services. As with the OAR, association means in particular, but is not limited to, a commercial, contractual, corporate or financial link with the Games and that no such link is

⁷⁶ Para.1(1) of Sch.4 of the 2006 Act; emphasis added.

created where a controlled representation is made in accordance with 'honest practices in industrial or commercial matters.'⁷⁷

The element of the LOAR that has attracted the most attention, however, is para.3 Sch.4 of the 2006 Act. This creates the rebuttable presumption that the use of certain combinations of words in everyday usage is an infringement of the LOAR. The combinations are the use of any of the expressions in the group A with any of the expressions in group B or with any of the other expressions in group A:

Group A: games, two thousand and twelve, 2012, twenty twelve

Group B: gold, silver, bronze, London, medals, sponsor, summer

Infringement is not limited to the words highlighted in para.3 as this must be read in conjunction with para.1. Thus, any representation of *any* words, combinations of words, images and combinations of words and images that *suggest* to the public that an association exists is prohibited. It should also be noted that the LOAR is infringed by a mere suggestion of an association with the Games, whereas the OAR requires that a representation is likely to create an association in the public mind and traditional IP law requires confusion.

The Host City Contract requires only that the expression, 'London 2012' is protected by statute, however, the breadth of the LOAR was seen as an essential means of protecting specific expressions that cannot be protected by copyright or trade mark.

⁷⁷ Para.1(2) of Sch.4 of the 2006 Act.

The only relevant exemption is where the words used accurately describe the product as there is not infringement of the LOAR when using indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or rendering of services, or other characteristics of goods or services.⁷⁸ Thus, for example, 'Young's London Gold' is a golden pale ale produced by the London-based brewers Young's that does not breach the LOAR, despite the use of a prohibited combination of words, as it describes the type of beer brewed and the location of the brewery.⁷⁹ Further, the LOAR covers situations where trade mark law is inadequate as ambushers are not trying to assert designation of origin rights through prohibited representations, or use protected logos, but to gain free exposure for their own goods and/or services from the publicity associated with the London 2012. A pertinent example is provided by the campaign launched by the Irish bookmakers Paddy Power at four of London's major transport interchanges shortly before the Opening Ceremony of the Games. The poster claimed:

OFFICIAL SPONSOR OF THE LARGEST ATHLETICS EVENT IN LONDON
THIS YEAR!
THERE YOU GO, WE SAID IT
(AHEM, LONDON FRANCE THAT IS)

LOCOG demanded that the posters be removed using its powers under Regs. 5 and 6 of the 2011 Regulations, and claimed that the advert infringed the LOAR. Paddy Power was in the process of applying to the High Court to challenge LOCOG's

⁷⁸ Para.7 of Sch.4 of the 2006 Act.

⁷⁹ <http://www.wellsandyoungs.co.uk/home/our-beers/ales/young-s-london-gold>, last accessed 17/08/12. However, in the run to and during London 2012, Young's was perhaps pushing its luck by replacing the normal green and gold background to its beer pump badges with a depiction of the Union Flag.

interpretation of the Regulations when LOCOG backed down and allowed the posters to remain.⁸⁰ Paddy Power's advert stated, truthfully, that it was sponsoring was the largest athletic event taking place in London, south west France and that therefore there was no breach of the LOAR, presumably as they had acted in accordance with para.7 of Sch.4 of the 2006 Act; the event in question happened to be an international egg and spoon race. Despite the intention to cash in on the interest in the Olympics, there was no contravention of any of the traditional forms of IP protection and no case in passing off. As the case did not reach court, it remains that there is no definitive interpretation of the LOAR and whether or not it was infringed by Paddy Power's advert. Perhaps its failure to pursue its claim was a deliberate tactic by LOCOG to avoid a narrower interpretation being proffered by the court at the expense of its own very broad view of how the LOAR should be defined.⁸¹

Finally, the LOAR covers situations that could not be considered to be instances of passing off as there is no misrepresentation about the official or authorised nature of any association made with the Games. Where ambush marketing is concerned, such a claim is unlikely to be made overtly, only hinted at. Further, infringement of the LOAR requires only that an association is suggested to the public, not as required in an action in passing off that there is a real likelihood of confusion.⁸² Thus, it should

⁸⁰ See further, S Chadderton, 'Charles Russell helps Paddy Power secure LOCOG backdown over billboards' available at: <http://www.thelawyer.com/charles-russell-helps-paddy-power-secure-locog-backdown-over-billboards/1013639.article> and MarketingWeek, 'Paddy Power Olympic ambush avoids ban' available at: <http://www.marketingweek.co.uk/news/paddy-power-olympic-ambush-avoids-ban/4002953.article>, both last accessed 19/08/12.

⁸¹ LOCOG also did not pursue actions against Nike or Odbbins for their similarly provocative campaigns.

⁸² Vine Products Ltd v Mackenzie and Co Ltd [1969] RPC 1.

be much easier to sustain an action of infringement of the LOAR than any of the traditional causes of action.

In respect of Sydney 2000, the similar protections found in the Sydney 2000 Games (Indicia and Images) Protection Act 1996 appear to have been given a restrictive or literal interpretation by the prosecuting authorities. This resulted in no prosecutions being brought under the Act, and questions as to whether such specific restrictions were necessary or appropriate to control ambush marketing.⁸³ In London, however, LOCOG applied a much wider, and in their view more purposive, interpretation when informing potential infringers that they were in breach of the LOAR such that any unauthorised association with the Games was considered to be unlawful, even if not caught by the specific words and phrases provided in the Act. Thus, whereas the Act is clear on the expressions that will be presumed to constitute an unauthorised association, LOCOG's advice was much wider, including situations where none of the controlled representations were used but an association with the Olympic Games or London 2012 could still be inferred by, for example, the accompanying pictures or context.

In terms of association, an example concerning the former Olympic gold medallist Sally Gunnell is instructive. Gunnell was asked to appear at the opening of easyJet's new service from London Southend airport. For her part in the advert, Gunnell was asked to raise the Union Flag above her shoulders whilst running across the tarmac to celebrate the opening of the new routes out of Southend and in a knowing

⁸³ J Curthoys and C Kendall, 'Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective' (2001) 8(2) *Murdoch University Electronic Law Journal* online, available at: <http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82.html> , last accessed 19/08/12.

homage to her triumphant and well known pose at the Barcelona Games when she won the 400m hurdles. Somewhat presciently, easyJet had invited a LOCOG representative to the photo shoot who was unhappy with the potential association being made between easyJet, which was not an official partner of London 2012, and the Olympic Games through the use of a famous Olympian; a compromise was reached in which the Union Flag, but not Ms Gunnell, was removed from the shot. Commenting on LOCOG's behaviour, Mark Ritson noted:

I am not sure what LOCOG calls this approach, but I can assure the organising committee that it has nothing to do with brand management. And it certainly has nothing to do with the Olympic brand – at least the original one that existed before it was interfered with by big corporations and bureaucrats.⁸⁴

The LOAR is a powerful tool for the protection of commercial rights and one that is new to UK law as it extends protection beyond what is available through the traditional means. The breadth of protection, including that any representation merely has to suggest an association with the Olympics, coupled with enforcement by the state as a criminal offence ensures that the rights held by LOCOG receive more protection than any other commercial organisation has been able to secure. This 'association right' clearly attempts to protect rights holders from the kind of commercial misappropriation that has been sought in passing off and breach of confidence actions.⁸⁵ Thus, the LOAR is a statutory form of protection of a kind that the Supreme Court has refused to develop but which has been identified as a

⁸⁴ Mark Ritson, 'No gold for Locog's brand management', Marketing Week, 19 April 2012.

⁸⁵ See Carty's arguments here.

potential area of growth of the IP Effect by Carty. The point at issue is that state protection has been granted to the commercial rights of a private company on the basis of lobbying rather than on any proven need. This development has occurred largely without question and appears to be accepted by Parliament as a necessary evil in order to secure the privilege of hosting the Olympic Games. As Grady et al note, this is a one sided process that does not provide a fair balance between the various stakeholder interests and over-privileges the IOC position.⁸⁶ We would add that the fact that these forms of protection are reaching the statute book via the pressure exerted from a transnational body based in Switzerland, ie the IOC, is also in need of serious examination.

In providing the legal guarantees to protect London 2012 from ambush marketing, no balancing of rights has taken place to the extent that LOCOG appears to have been trying to establish absolute control over any connection, however made, with London 2012. This was particularly evident where small and local businesses were concerned, many of whom received visits from the 'branding police' and were warned about their behaviour and forced to remove offending signs, banners, depictions of the rings and balloons.⁸⁷ Where larger organisations were concerned, however, LOCOG was more reticent in pursuing its rights under the 2006 Act, as was seen by its reaction to the Paddy Power and Nike campaigns in particular.

THE CRITIQUE: WHY SHOULD THE LAW BE EXTENDED?

⁸⁶ See Grady et al, p154.

⁸⁷ See discussion in text above.

Instead of providing what is at best the very functional justification that these legislative protections are a requirement by the Host City Contract and must be implemented in order to host the Games, it is important to ascertain whether there is an appropriate rationale for introducing these 'super-IP' rights. In particular, such an analysis is important as similar protections will be in place for the 2014 Commonwealth Games in Glasgow⁸⁸ and legislation of a similar nature is becoming a requirement for hosting many of the world's sporting mega events, including in particular the FIFA World Cup and UEFA European Nations Championships. Thus, it must be determined whether sports events are particularly susceptible to ambush marketing such that super-IP can be justified as maintaining the necessary balance between the various affected parties or whether, in their desperation to host these events, legislatures are prepared to bend the law to fit the demands of the event organisers.

One of the defining characteristics of laws generally, and intellectual property rights specifically, is that they have historically been territorial; i.e. they normally operate only within the confines of the state in which they were enacted.⁸⁹ However, whilst the rights maybe national or state focussed, the trade in intellectual properties is transnational, and as more and more concern needs to be taken of the global, the needs of countries to try and protect rights outside of their borders have increased. As Bently and Sherman note, initially this took the form of bilateral treaties but increasingly this took the form of multilateral arrangements; the first of these being the Paris Convention for the Protection of Industrial Property in 1883.⁹⁰ This has

⁸⁸ See Glasgow Commonwealth Games Act 2008, ss10-16.

⁸⁹ For a useful exposition of this see L. Bently and B. Sherman, Intellectual Property Law, 2009, p5et seq

⁹⁰ Paris Convention for the Protection of Industrial Property of March 1883, as revised.

been followed by a number of subsequent treaties such as the Berne Convention for the Protection of Literary and Artistic Works in 1886. In terms of copyright along with the various manifestations and versions of Berne,⁹¹ other international developments have affected the development of national law including the Rome Convention,⁹² TRIPS and WIPO. The role of WIPO is in fact an interesting one:

The expansion of international arrangements for the protection of intellectual property continued through the twentieth century and into the present one. Over this time, the Paris and Berne conventions have been revised on a number of occasions, their membership has expanded...and a number of new treaties have been formulated. Most of these treaties have been developed and supervised by the World Intellectual Property Organisation.⁹³

Established in 1970 and currently numbering 185 member states as members, WIPO 'has built itself around the attempt to promote and harmonize intellectual property laws internationally, though the organization's actual responsibility within the UN system is significantly broader: "promoting creative intellectual activity and... facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development".⁹⁴ It is a specialised agency of the United Nations,⁹⁵ although it is unique amongst all the

⁹¹ Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886.

⁹² International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Rome 26 October 1961

⁹³ L. Bently and B. Sherman, Intellectual Property Law, 2009, p6.

⁹⁴ J. Boyle, "A Manifesto on WIPO and the future of Intellectual Property", (2004) *Duke Law and Technology Review*, 1-2.

⁹⁵ On international organisations generally, see J. Alvarez, "International Organizations: Then and Now", *American Journal of International Law*, (2006) 324.

other branches in that it has financial resources outside of Member State contributions, with 90% of its income generated from the collection of fees from the intellectual property application and registration systems that it administers.

However whilst WIPO is an agency of the UN, governed by state-signed multi-lateral and multi-party agreements WIPO, and as such there may be a sound jurisprudential rationale for allowing them to be the drivers of legislation, what we see with the Olympics is completely different, as here we have a private body as the driver of these restrictions and controls. Whilst the government has a role in protecting the commercial freedoms of national and local business communities it must also seize appropriate opportunities, whether social, cultural or sporting, as well as economic, of hosting a mega event such as the Olympic Games. However, it is the balance between these two notions that is in need of unpacking:

Given the two governmental roles outlined above, one must ask whether it is properly within the role of government to enact laws that substantially expand its existing business and trademark laws solely for the short term benefit and protection of a privately-run sports organisation and its elite cadre of official sponsors.⁹⁶

This is exacerbated by the fact that these global sponsors often have no real ties to the host country itself and that this short-term approach may be at the expense of the host's own business community and citizens. This might be seen to be the case

⁹⁶ John Grady, Steve McKelvey and Matthew Bernthal 'From Beijing 2008 to London 2012: Examining event-specific Olympic legislation vis-à-vis the rights and interests of stakeholders' *Journal of Sponsorship* 144 2010, 149-150.

for example when we consider the divergent approaches taken to local traders and to large corporations when looking at how they are treated by the advertising and trading regulations,⁹⁷ or the bifurcation in approach taken to tax during London 2012.⁹⁸ Certainly Grady et al in their analysis of legislation across Beijing, Vancouver and London argue that these protections are asymmetrical and have adversely affected the balance between UK businesses and the corporate sponsors of sporting mega-events.

CONCLUSION

There appears to be no sound jurisprudential basis for the introduction of this super-IP right of association. From a pragmatic perspective, it is necessary to enable LOCOG to generate enough income through sponsorship to host London 2012; however, there is almost no analysis of whether the use of the coercive power of the state to protect of private body's commercial rights is appropriate, legitimate or even lawful. In addition, it is arguable that there is little or no rationale for event specific legislation such as this, and that the problem of ambush marketing could be easily and effectively dealt with by adopting less aggressive brand protection and a more targeted educative strategy.

The creation of this super-IP right has been achieved with almost no dissent. In the 12 months immediately preceding London 2012, almost every intellectual property

⁹⁷ See James and Osborn Routledge

⁹⁸ See David Anderson 'Olympic Taxation' *Tolley's Practical audit and Accounting* 23 PAA 6, 63 1 March 2012, and also HMRC Tax exemptions for the 2012 Games <http://www.hmrc.gov.uk/2012games/tax-exemptions/index.htm>, last accessed 19 July 2012. More specifically see The London Olympic Games and Paralympic Games Tax Regulations 2010 available online at <http://www.legislation.gov.uk/ukxi/2010/2913/contents/made> last accessed 19 July 2012.

department in the UK produced a guide on how not to breach the 2006 Act and the 2011 Regulations, but none have asked whether this is an appropriate development of the law or an appropriate use of state resources. Further, rather than focussing on extensions of protections of commercial sponsor rights, we have argued previously that the terms of the host city contract could instead be re-oriented to better reflect the Olympic ideals that the IOC is mandated to uphold.⁹⁹

In addition, there is a strong argument that the choice of sponsors ought to be more closely examined. Rather than concentrate on the so called parasitical actions of ambushers attaching themselves to the host, perhaps we should be looking more closely at the provenance of with whom the IOC chooses to associate itself as official sponsors and determine whether these are in accordance with the Olympic Ideals. In other areas of sport, sponsors from the tobacco industry are carefully regulated,¹⁰⁰ and alcohol is treated with some caution, but even areas such as junk food perhaps could be more thoughtfully dealt with given that there is an ethical dilemma in such bodies being allowed to sponsor events that avowedly seek to leave a legacy of sports participation and public health that deals, in part, with the obesity epidemic.¹⁰¹

Indeed, it may well be that the much mooted legacy of the Games will be all the poorer for these impositions on our freedom of expression at the behest of corporate sponsors and the IOC, instead of being an opportunity to drive positive changes in sport, education and culture in the host city, country and beyond. Commentators

⁹⁹ See Palgrave Also B. Kidd, "Human rights and the Olympic Movement after Beijing", (2010) *Sport in Society* 901.

¹⁰⁰ See for example the Tobacco Advertising and Promotion Act 2002.

¹⁰¹ A. Garde and N. Rigby, 'Going for Gold – should responsible governments raise the bar on sponsorship of the Olympic Games and other sporting events by food and beverage companies?' *Communications Law* 2012 42

have already noted the sterilising effect on cultural space around the Games arenas,¹⁰² and from an intellectual property perspective the inability of anyone to use specific words and phrases to associate themselves with or link to the event actually runs the risk of reducing even further the cultural footprint of the Games on London.¹⁰³ Similarly, whilst LOCOG has privileged the brand, as Ritson notes 'it has focussed all its efforts on identity at the expense of positioning' and that a repositioning of how they perceive the brand, and its relationship with intellectual property rights, would seem to be in order.

LOCOG's desire for absolute control over the commercial rights associated with London 2012 even saw the imposition of conditions of use for persons wanting to link to their website, stressing that such linking should not be used to create an unauthorised association and that users 'agree that no such link shall portray us or any other official London 2012 organisations...in a false, misleading, derogatory or otherwise objectionable manner. Similarly Space Hijackers twitter account was shut down because of their unauthorised use of an adapted LOCOG trademark.¹⁰⁴ It appears that the IOC is having a considerable effect upon the control and flow of information and the ramifications of transnational private bodies effectively creating laws in nation states is only now becoming fully realised

Only now are Londoners waking up to the statutory scope that parliament conceded to the IOC back in 2006. It could command London's police, traffic,

¹⁰² See for example

¹⁰³ See here the argument of T. Hickman, 'Freedom of Expression and the Olympics' *UK Constitutional Law Group Blog* May 3 2012, available online

¹⁰⁴ See S. Malik, 'Twitter suspends account for using London 2012 Olympics 2012 logo', *The Guardian* 2012 <http://www.guardian.co.uk/sport/2012/may/23/twitter-london-2012-olympic-logo>, last accessed 08/11/2012.

advertising and business activity. It could enjoy unlimited access to the British exchequer. A £3bn budget swiftly ballooned to £9bn. London is now being given a taste of what an unaccountable world government might be like, an Orwellian world of Zil lanes and G4S, private regulators and LOCOG inspectors roaming the streets, tearing down political banners and Pepsi ads. Not since William of Orange arrived with his Dutch army in 1688 has London's government been surrendered so completely to an alien power.¹⁰⁵

This lack of an appropriate justification may make it increasingly difficult for the government to refuse to enact similar legislation for the benefit of the organisers of future mega events hosted in the UK but also more difficult to get the buy-in of local businesses and others affected by the rampant commercialism of these events. Perhaps the end result of all of this will be the introduction of a standardised or more generic statutory approach along the lines of New Zealand's Major Events Management Act 2007, or that sporting mega events will in future only be held in countries that are willing and constitutionally able to impose on their citizens the restrictions required by rights owners such as the IOC.

¹⁰⁵ S. Jenkins, 'The craving for massive live events is ruining our cities' *The Guardian* 17 July 2012.